

The Morality of Human Rights†

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In the period since the end of the Second World War, there has emerged what never before existed: a truly global morality. That morality, which I call “the morality of human rights,” consists not only of various rights recognized by the great majority of the countries of the world as human rights but also of a fundamental imperative that directs “all human beings” to “act towards one another in a spirit of brotherhood.” The imperative—articulated in the very first article of the foundational human rights document of our time, the Universal Declaration of Human Rights (UDHR)¹—is fundamental in the sense that, as I later explain, it serves, in the morality of human rights, as the normative ground of human rights.

† Some of the material in this Article is drawn from my new book, *Human Rights in the Constitutional Law of the United States* (2013). Most of the material here that is not drawn from my book was first presented in a lecture I delivered at Santa Clara University in March 2013, under the auspices of the Bannan Institute of the Ignatian Center for Jesuit Education. I am deeply grateful to the Bannan Institute for honoring me with the opportunity to deliver the lecture.

For helpful comments on the penultimate draft of this Article, I am indebted to Chris Eberle, Steve Smith, and Nick Wolterstorff. I am also grateful, for helpful discussion, to the participants, especially Dick Arneson and Rob Kar, in the Conference on the Status of International Law and International Human Rights that was held at the University of San Diego School of Law on May 3–4, 2013, under the auspices of the school’s Institute for Law and Philosophy.

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1. Article I of the UDHR states, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

My discussion of the morality of human rights in this Article presupposes that the reader is familiar with the internationalization of human rights: the growing international recognition and protection, in the period since the end of the Second World War, of certain rights as human rights. The Appendix to this Article is for readers not familiar with the internationalization of human rights.²

I begin, in the first Part of the Article, by explaining what the term *human right* means in the context of the internationalization of human rights. I also explain both the sense in which some human rights are, in some legal systems, “legal” rights and the sense in which all human rights are “moral” rights.

Then, in the longer second Part, I turn to the inquiry that is my principal concern in this Article: Why should one take seriously the imperative that serves, in the morality of human rights, as the normative ground of human rights? That is, what reason or reasons does one have, if any, to live one’s life in accord with the imperative to “act towards all human beings in a spirit of brotherhood”?

I.

“Notwithstanding their European origins, . . . In Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity.”

—Jürgen Habermas³

Nothing in this Article depends on the claim that the morality of human rights is the first global morality—or even on the claim that the morality of human rights is a global morality. Even if it is not a global morality, much less the first global morality, the morality of human rights is an important morality—sufficiently important that it is worthwhile to do what I do in this Article: clarify and interrogate aspects of the morality of human rights.

2. It bears emphasis that in this Article, I do not assert, imply, or presuppose a position on any question concerning the effectiveness or even the legitimacy of any part of the international, U.N.-sponsored human rights system, including any question concerning the effectiveness or the legitimacy of any of the institutions that are part of the international human rights system. My focus in this Article is on the morality of human rights, not on the international human rights system. Skepticism about the effectiveness or the legitimacy of one or more parts of that system is ample and various, but I do not engage such skepticism here.

3. JÜRGEN HABERMAS, *RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY* 153 (Eduardo Mendieta ed., 2002).

Lloyd Weinrib has written that “despite their ubiquity in our discourse, it is unclear just what a right is.”⁴ In discourse about *human rights*, it is often unclear just what a “human right” is—or, more precisely, just what *human right* means. So, a clarification of what Jürgen Habermas calls the “language” of human rights is in order: In the context in which I am interested here—the context of the internationalization of human rights—what does *human right* mean?

When we read any human rights instrument, be it international, regional, or national, we see that the substantive provisions of the instrument—as distinct from the procedural provisions, which concern such matters as monitoring bodies and reporting requirements—state rules of conduct. More precisely, the substantive provisions state rules of conduct *mainly for government*, both rules that direct government *not* to do something *to* human beings and rules that direct government *to do* something *for* human beings. As Habermas emphasizes, the language of “human rights” has become the principal language in which such rules are articulated and discussed. Moreover, the language of “rights” entails the language of “duties”: To say that *A* has a “right” that *B* not do *X* to *A* is to say that *B* has a “duty” not to do *X* to *A*; to say that *A* has a “right” that *B* do *Y* for *A* is to say that *B* has a “duty” to do *Y* for *A*.

In the language of rights and duties, those whose conduct a rule governs are duty bearers with respect to the rule, and those to whom the duty bearers are not to do something or for whom the duty bearers are to do something are rights holders. To say that someone, *A*, “has” a particular right is a way of saying that there is a particular rule of conduct according to which *A* is a rights holder. And to say that someone, *B*, has “violated” a particular right of *A*’s is to say that there is a particular rule of conduct according to which *A* is a rights holder and *B* is a duty bearer and that *B* has done to *A* what according to the rule, the duty bearers are not to do to the rights holders or that *B* has not done for *A* what according to the rule, the duty bearers are to do for the rights holders.

However, to say that there is a particular right—a particular rule of conduct—is *not* to say what authority, if any, the right or rule has. In saying that there is a particular right, one may be claiming that the right is (1) legislated, so to speak, by God; (2) warranted by “reason”; (3) protected in the legal system of one’s country; (4) listed in a treaty to

4. Lloyd L. Weinreb, *Natural Law and Rights*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 278, 281 (Robert F. George ed., 1992).

which one's country is a party; and so on. The claim that a particular right or rule has this or that authority—that the right or rule is warranted by “reason”—is contestable and indeed may be false.

As the various international human rights treaties—all of which I list in the Appendix—illustrate,

- in the case of all international human rights, the duty bearers include government actors;
- in the case of most international human rights, the duty bearers include only government actors;
- in the case of some international human rights, the duty bearers include nongovernment “private” actors as well as government actors;
- in the case of most international human rights, the rights holders include all human beings—all *born* human beings;⁵ and
- in the case of some international human rights, however, the rights holders include not *all* human beings but only *some*.

Article 37 of the Convention on the Rights of the Child (CRC), which is the most widely ratified international human rights treaty,⁶ is an example of an international human right according to which the rights holders are not all human beings but only some: Article 37 requires government to “ensure that: (a) Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”⁷ Article 38 of the CRC is another example: Article 38 requires government to “refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”⁸

As Articles 37 and 38 of the CRC reflect, that government may justifiably do something to some human beings does not entail that government may justifiably do the same thing to all human beings; that government

5. The UDHR states, in Article 1, that “[a]ll human beings are born free and equal in dignity [A]nd should act towards one another in a spirit of brotherhood.” UDHR, *supra* note 1, art. 1.

6. As of December 2012, there were 193 state parties to the CRC: every member of the United Nations except Somalia and the United States. See *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtsg_no=IV-11&chapter=4&lang=en (last visited Mar. 12, 2014).

7. Convention on the Rights of the Child art. 37, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf.

8. *Id.* art. 38.

may justifiably recruit adults into the military does not entail that it may justifiably recruit children. Similarly, that government may justifiably decline to do something for some human beings, for example, able-bodied persons, does not entail that it may justifiably decline to do the same thing for human beings who are disabled. One of the most recent international human rights treaties to enter into force is the Convention on the Rights of Persons with Disabilities, which entered into force in 2008.⁹

In what sense is a right according to which the rights holders are not all human beings but only some, for example, children, truly a *human* right? The UDHR states, in Article 1, that “[a]ll human beings . . . [S]hould act towards one another in a spirit of brotherhood.”¹⁰ As the concept *human right* is understood both in the UDHR and in all the various international human rights treaties that have followed in the UDHR’s wake, a right is a *human right*, even if according to the right the rights holders are not all but only some human beings, if the rationale for establishing and protecting the right, for example, as a treaty-based right, is, in part, that conduct that violates the right violates the imperative to “act towards all human beings in a spirit of brotherhood.” Each of the human rights articulated in the UDHR or in one or more international human rights treaties, for example, the right, articulated in Article 5 of the UDHR and elsewhere, not to be subjected to “cruel, inhuman or degrading treatment or punishment,”¹¹ is a specification of what, in conjunction with other considerations, the imperative is thought to forbid or to require, which imperative serves as the normative ground of human rights. More about that in the next Part. The rationale for Article 38 of the CRC is, in part, that conduct that violates Article 38 fails to act “in a spirit of brotherhood” toward some human beings: children.

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In what sense—and where—are some human rights “legal” rights?

9. As of March 2013, there were 130 state parties to the Convention on the Rights of Persons with Disabilities. See *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION (Dec. 2006), http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-15&chapter=4&lang=en.

10. See UDHR, *supra* note 1, art. 1.

11. Article 5 of the UDHR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.* art. 5.

A particular right—including a particular human right—is a legal right in a particular legal system, *in a meaningfully practical sense of “legal,”* if and only if the right is generally enforceable in that legal system. So, a particular right, for example, the right to freedom of religion, may be a legal right in one legal system, for example, Canada, but not in another, for example, Saudi Arabia.

I discuss the UDHR in the Appendix. It bears emphasis that the fact that a right is listed in the UDHR does not mean that the right is a legal right anywhere because that a right is listed in the UDHR does not mean that the right is enforceable anywhere. Indeed, as Eleanor Roosevelt stated, immediately preceding the United Nations General Assembly’s adoption of the UDHR,

“In giving our approval to the [UDHR] today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.”¹²

As it happens, “the Universal Declaration of Human Rights has served as a model for constitution makers. Countless constitutions written since 1948 contain guarantees that either mirror or draw upon the Declaration.”¹³

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In what sense are all human rights “moral” rights?

As I just explained, not every human right—not every right internationally recognized as a human right—is a legal right in every country. Indeed, and sadly, although many human rights are legal rights in many countries, no human rights are legal rights in some countries. Happily, the number of such countries is diminishing, albeit slowly. Nonetheless, is every

12. 5 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 16, at 243 (1965) (quoting Mrs. Franklin D. Roosevelt, U.S. Representative to the Gen. Assembly, General Assembly Adopts Declaration of Human Rights (Dec. 9, 1948), *in* DEP’T ST. BULL., Dec. 19, 1948, at 751, 751).

On “customary international law” and the debate among international lawyers about whether the rights listed in the UDHR, or some of them, have achieved the status of customary international law, see THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 41–46 (4th ed. 2009); RICHARD B. LILICH ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 146–61 (4th ed. 2006).

13. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT’L L. 3, 18 (2009) (citing Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 313 (1996)).

human right a moral right? More precisely, is every putative human right a putative moral right?

Recall that as the concept *human right* is understood in the UDHR and in every international human rights treaty, a right is a *human right* if the rationale for establishing and protecting the right is, in part, that conduct that violates the right violates the “act towards all human beings in a spirit of brotherhood” imperative. Given that understanding of *human right* and assuming that the category *moral right* includes whatever else it includes,¹⁴ rights whose fundamental rationale is that conduct that violates the right violates the “act towards all human beings in a spirit of brotherhood” imperative or some equivalent norm, every human right is a moral right.

Some have insisted, however, that moral rights are not really rights, that the only genuine rights are legal rights, and that so-called moral rights are phony, counterfeit, faux pseudo-rights. Consider, in that regard, Jeremy Bentham’s famous dismissal of the language of “natural” rights:

[1.] Of a natural right who has any idea? I, for my part, have none: a natural right is a round square, – an incorporeal body. What a legal right is I know. I know how it was made. I know what it means when made. To me a right and a legal right are the same thing Right and law are correlative terms: as much so as son and father. Right is with me the child of law: from different operations of the law result different sorts of rights.¹⁵

[2.] *Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights, a bastard brood of monsters, ‘gorgons and chimaeras dire.’¹⁶

[3.] *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts.¹⁷

14. There is no consensus about the concept of *morality*. See, e.g., MORALITY AND SELF-INTEREST (Paul Bloomfield ed., 2008); Joel J. Kupperman, *Why Ethical Philosophy Needs To Be Comparative*, 85 PHILOSOPHY 185 (2010); Jean Porter, *Christian Ethics and the Concept of Morality: A Historical Inquiry*, J. SOC’Y CHRISTIAN ETHICS, Fall/Winter 2006, at 3.

15. Jeremy Bentham, *Supply Without Burthen or Escheat Vice Taxation*, in NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 70, 72–73 (Jeremy Waldron ed., 1987).

16. Jeremy Bentham, *Anarchical Fallacies*, in NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN, *supra* note 15, at 46, 69.

17. *Id.* at 53.

According to Amartya Sen,

[Bentham's] suspicion remains very alive today, and despite persistent use of the idea of human rights in practical affairs, there are many who see the idea of human rights [understood as *moral* rights] as no more than "bawling upon paper," to use another of Bentham's barbed portrayals of natural right claims.¹⁸

The fundamental difference between legal rights and moral rights concerns the enforceability of the rights. Legal rights are, as such, enforceable. Social rights too—rights that, although they do not have the status of law in a particular community, are nonetheless widely regarded by members of the community as authoritative for the community—are, as such, enforceable; members of the community enforce them by shaming those who violate the rights, or by shunning them. In what way, if any, are moral rights—moral rights as such and not as social or legal rights—enforceable?

For one who believes that God enforces true moral rights, by punishing or otherwise holding accountable those who violate the rights, moral rights too are enforceable. But for one who is not a theist—or for a theist who does not believe that God is in the business of holding accountable those who violate true moral rights—moral rights are not, as such, enforceable. And for some for whom moral rights are not, as such, enforceable, moral rights are not really "rights" at all. Listen to Raymond Geuss: "[E]ssential to the existence of a set of 'rights' [is] that there be some specifiable and more or less effective mechanism for enforcing them[.]"¹⁹ Listen, too, to Alasdair MacIntyre:

[W]henever [there is] good reason for describing transactions in [the language of rights], it is always in virtue of the existence . . . of some particular set of institutional arrangements requiring description in those terms, and the rights in question therefore will always be institutionally conferred, institutionally recognized and institutionally enforced rights²⁰

Given what Bentham, Geuss, MacIntyre, and others have emphasized, why not just abandon the arguably misleading language of *moral rights*? What is gained, if anything, by using that language?

18. Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315, 316 (2004).

19. RAYMOND GEUSS, *HISTORY AND ILLUSION IN POLITICS* 143 (2001). For a critique of Geuss's position, see John Tasioulas, *The Moral Reality of Human Rights, in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 75, 79–88 (Thomas Pogge ed., 2007).

20. NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* 32 (2008) (quoting Alasdair MacIntyre, W. Alton Jones Distinguished Professor of Philosophy, Vanderbilt Univ., *Are There Any Natural Rights?* (Feb. 28, 1983), in ALASDAIR MACINTYRE, *ARE THERE ANY NATURAL RIGHTS?* 12 (1983)).

[T]he ancients and the medievals did not have the notion of a right—was their moral life stunted in some way as a result? Did they lack the tools for dealing with certain aspects of the moral enterprise? Among them moral questions were dealt with in terms of what is [morally] right or wrong, what is in accordance with or required by the natural law, what people ought to do or are obliged to do, but not in terms of what someone has a right to, or has a right to do.²¹

Again, what if anything is gained by using the language of *moral rights*? Here is John Finnis's answer, in *Natural Law and Natural Rights*:

[T]he modern vocabulary and grammar of [moral] rights [are an] instrument for reporting and asserting the requirements or other implications of a relationship of justice from the point of view of the person(s) who benefit(s) from that relationship. It provides a way of talking about 'what is just' from a special angle: the viewpoint of the 'other(s)' to whom something (including, *inter alia*, freedom of choice) is owed or due, and who would be wronged if denied that something.

. . . .

The modern language of rights provides . . . a supple and potentially precise instrument for sorting out and expressing the demands of justice.²²

James Griffin makes a similar but more focused point in *On Human Rights*. He speaks not about the usefulness of moral rights talk generally but about the usefulness of a particular kind of moral rights talk, namely, human rights talk:

21. THEODORE M. BENDITT, *RIGHTS* 3 (1982). John Finnis and James Griffin make much the same point: “[I]t is salutary to bear in mind that the modern emphasis on the powers of the right-holder, and the consequent systematic bifurcation between ‘right’ (including ‘liberty’) and ‘duty’, is something that sophisticated lawyers were able to do without for the whole life of classical Roman law.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 209 (2d ed. 2011). “Ethics . . . could do without the discourse of [human] rights and still say all that is necessary to it.” JAMES GRIFFIN, *ON HUMAN RIGHTS* 94 (2008).

22. FINNIS, *supra* note 21, at 205, 210 (emphasis omitted). Immediately after emphasizing the usefulness of moral rights talk, John Finnis cautions that such talk “is often, . . . though not inevitably or irremediably, a hindrance to clear thought when the question is: What are the demands of justice?” *Id.* at 210 (emphasis omitted). For a critique of rights talk that hinders “clear thought” about “the demands of justice,” see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). It bears emphasis that Professor Glendon’s critique of *some* rights talk is not a critique of *all* rights talk; for Glendon’s embrace of talk about international human rights, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) [hereinafter GLENDON, *A WORLD MADE NEW*].

[T]he discourse [of human rights] has distinct merits. It focuses and gives prominence to obligations that arise, not from social status or special talents or skills, but from the dignity of human status itself. The dignity of human status itself is not the only, or the most, important moral status that human beings have. The case for singling it out is largely practical. Ring-fencing this particular status gives it prominence, ease of transmission, enhanced effectiveness in our social life, and indeed in our moral life, and so on.²³

For better or worse, the language of rights—especially the language of human rights—is now a common feature of moral discourse throughout the world and is likely to remain so. Indeed, the language of human rights has become the moral *lingua franca*. Look again at the Habermas quote at the beginning of this Part. It is difficult to see that there is anything of consequence to be gained by refusing to make peace with that state of affairs.

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Now, with the foregoing clarification of human rights talk—of what Habermas calls the “language” of human rights—behind us, I want to pursue the inquiry that is my principal concern in this Article.

II.

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

—Article 1, Universal Declaration of Human Rights²⁴

The fundamental imperative articulated in the foundational human rights document of our time—the UDHR—directs “all human beings” to “act towards one another in a spirit of brotherhood.”²⁵ In drafting Article 1 as he did, René Cassin, the French delegate,

had wanted to stress “the fundamental principle of the unity of the human race” because Hitler had “started by asserting the inequality of men before attacking their liberties.” Later on, Cassin reiterated the point that “the authors of that Article had wished to indicate the unity of the human race regardless of frontiers, as opposed to theories like those of Hitler.” When someone in the Third Committee

23. GRIFFIN, *supra* note 21, at 94.

24. UDHR, *supra* note 1, art. 1.

25. Because, as Dianne Amann has emphasized to me, the term *brotherhood* has a masculine resonance, it is useful to remember that the UDHR was drafted and adopted in 1948. Is *fraternité* better? The French version of Article 1, which is the language in which Article 1 was originally drafted, states, “Tous les êtres humains naissent libres et égaux en dignité et en droits. Ils sont doués de raison et de conscience et doivent agir les uns envers les autres dans un esprit de fraternité.” *Id.*

observed that these principles were too well known and did not need to be stated again, Cassin quickly responded that that argument “was invalid in light of recent events. Within the preceding years,” he said, “millions of men had lost their lives, precisely because those principles had been ruthlessly flouted.” He thought it “was essential that the UN should again proclaim to mankind those principles which had come so close to extinction and should refute the abominable doctrine of fascism.”²⁶

The “act towards all human beings in a spirit of brotherhood” imperative is fundamental in the sense that it serves, in the morality of human rights, as the normative ground of human rights. Again, as the concept *human right* is understood both in the UDHR and in all the various international human rights treaties that have followed in the UDHR’s wake, a right is a *human right*, even if according to the right the rights holders are not all but only some human beings, if the rationale for establishing and protecting the right, for example, as a treaty-based right, is, in part, that conduct that violates the right violates the imperative to “act towards all human beings in a spirit of brotherhood.” Each of the human rights articulated in the UDHR or in an international human rights treaty, for example, the right, articulated in Article 5 of the UDHR and elsewhere, not to be subjected to “cruel, inhuman or degrading treatment or punishment,”²⁷ is a specification of what, in conjunction with other considerations, the imperative—the normative ground of human rights—is thought to forbid or to require.

A particular specification is controversial if and to the extent the supporting claim—a claim to the effect that the “act towards all human beings in a spirit of brotherhood” imperative forbids or requires *X*—is controversial. In this Article, however, I am not interested in defending or criticizing particular specifications.²⁸ I am interested instead in interrogating the imperative itself: What reason or reasons does one have, if any, to live one’s life in accord with the imperative to “act towards all human beings in a spirit of brotherhood”?

26. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 38–39 (1999) (citations omitted). On René Cassin, see GLENDON, *A WORLD MADE NEW*, *supra* note 22, at 61–64.

27. Article 5 of the UDHR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” UDHR, *supra* note 1, art. 5.

28. I have defended two such specifications—the right to moral equality and the right to religious and moral freedom—elsewhere: PERRY, *supra* note †, ch. 6–7; Michael J. Perry, *Freedom of Conscience as Religious and Moral Freedom*, 29 *J.L. & RELIGION* 124 (2014).

Let us consider the principal response to that question embedded in the three main components of the International Bill of Human Rights²⁹: the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The UDHR refers, in its preamble, to “the inherent dignity . . . of all members of the human family” and states, in Article 1, that “[a]ll human beings are born free and equal in dignity . . . [A]nd should act towards one another in a spirit of brotherhood.”³⁰ The ICCPR and the ICESCR each refer, in their preambles, to “the inherent dignity . . . of all members of the human family”³¹ and to “the inherent dignity of the human person”³²—from which, both covenants declare, “the equal and inalienable rights of all members of the human family . . . derive.”³³

In 1986, the U.N. General Assembly adopted a resolution—A/RES/41/120, titled “Setting International Standards in the Field of Human Rights”—according to which international human rights treaties should not designate a right as a human right unless the right is, *inter alia*, “of fundamental character and derive[s] from the inherent dignity and worth of the human person.”³⁴ In 1993, the U.N.-sponsored World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, which includes this language in its preamble: “Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person”³⁵

The passages quoted in the preceding two paragraphs constitute this twofold claim: *Each and every—born—human being (1) has equal inherent dignity and (2) is therefore inviolable: not to be violated.*

The Oxford English Dictionary gives this as the principal definition of *dignity*: “The quality of being worthy or honourable; worthiness, worth, nobleness, excellence.”³⁶ That every human being has “inherent” dignity is the International Bill’s way of saying that the dignity that every human

29. On the International Bill of Human Rights, see *infra* Appendix.

30. UDHR, *supra* note 1, pmb., art. 1.

31. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 172; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, 4.

32. International Covenant on Civil and Political Rights, *supra* note 31, at 173; International Covenant on Economic, Social and Cultural Rights, *supra* note 31, at 5.

33. International Covenant on Civil and Political Rights, *supra* note 31, at 172–73; International Covenant on Economic, Social and Cultural Rights, *supra* note 31, at 4–5.

34. G.A. Res. 41/120, ¶ 4(b), U.N. Doc. A/RES/41/120 (Dec. 4, 1986).

35. United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993).

36. 4 THE OXFORD ENGLISH DICTIONARY 656 (2d ed. 1989).

being has is, not as a member of one or another group—racial, ethnic, national, religious, et cetera—not as a man or a woman, not as someone who has done or achieved something, and so on, but simply as a human being. To say that every human being has “equal” inherent dignity is to say that no human being has more—or less—inherent dignity than another human being: “All human beings are . . . equal in dignity . . .”³⁷ Hereafter, when I say *inherent dignity*, I mean “equal inherent dignity.”

That every human being is inviolable—not to be violated—is to say that one should not violate any human being; instead, one should respect every human being, that is, “[a]ll human beings . . . [S]hould act towards one another in a spirit of brotherhood.”³⁸ One *violates* a human being, in the relevant sense of *violate*, when one fails to “act towards [the human being] in a spirit of brotherhood.”³⁹ One *respects* a human being when one does “act towards [the human being] in a spirit of brotherhood.”⁴⁰

Moreover, “act[ing] towards [all human beings] in a spirit of brotherhood”⁴¹ requires that one does what one reasonably can, all things considered, both to prevent certain hurtful things from being done to human beings, whether to all human beings or just to some, for example, children, and to require that certain helpful things be done for human beings, whether for all human beings or just for some, for example, the disabled. Therefore, and in particular, one should do what one reasonably can to get certain rights—certain rules of conduct—established and protected. If one refuses to do what one reasonably can, all things considered, both to prevent certain hurtful things from being done to human beings and to require that certain helpful things be done for human beings, then one is not respecting those human beings—one is not “act[ing] towards [them] in a spirit of brotherhood”⁴²—but, instead, one is violating them.

What rights should one do what one reasonably can to get established and protected? That is, what hurtful things should one do what one reasonably can to prevent from being done to human beings? What helpful things should one do what one reasonably can to require be done for human beings?

37. UDHR, *supra* note 1, art. 1.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

In the context of the UDHR and human rights treaties, both international and regional, the fundamental concern is rights *against government*.⁴³ In that context, the answer to the question posed in the preceding paragraph is this: those hurtful things the doing of which by government, and those helpful things the not doing of which by government, one judges to be failures by government to act toward its citizens or others with whom it deals “in a spirit of brotherhood.”

The large majority of the nations of the world agree about what many of the “doings” and “not doings” by government are that constitute failures by government to act toward its citizens or others with whom it deals “in a spirit of brotherhood.” The large majority of nations also agree, therefore, about what many of the rights are—rights against government—that should be established and protected: the rights listed in the UDHR and in those human rights treaties to which the large majority of nations are parties.

* * * * *

The International Bill of Human Rights’ foundational twofold claim—that every human being has inherent dignity and is therefore inviolable—gives rise to an inquiry I now want to pursue. These three linked passages are prologue to the inquiry:

- “The masses blink and say: ‘We are all equal. – Man is but man, before God – we are all equal.’ Before God! But now this God has died.” —Friedrich Nietzsche⁴⁴
- “Nietzsche’s thought[:] there is, not only no God, but no metaphysical order of any kind” —Bernard Williams⁴⁵

43. Some rights against government are indirectly rights against nongovernmental—nonstate—actors: the rights that require government to protect human beings from one or another kind of abusive action by nongovernmental actors. See Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT’L L. 341, 342 (2010).

44. FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, quoted in GEORGE PARKIN GRANT, *ENGLISH-SPEAKING JUSTICE* 77 (Stanley Hauerwas & Alasdair MacIntyre eds., 1985); cf. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, 81 YALE REV. 1, 3–4 (1993) (“When contemporary admirers of Plato claim that all featherless bipeds – even the stupid and childlike, even the women, even the sodomized – have the same inalienable rights, admirers of Nietzsche reply that the very idea of inalienable human rights . . . is a laughably feeble attempt by the weak to fend off the strong.”).

45. Bernard Williams, *Republican and Galilean*, N.Y. REV. BOOKS, Nov. 8, 1990, at 45, 48 (reviewing CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989)); cf. JOHN M. RIST, *REAL ETHICS: RECONSIDERING THE FOUNDATIONS OF MORALITY* 2 (2002) (“[Plato] came to believe that if morality, as more than ‘enlightened’ self-interest, is to be rationally justifiable, it must be established on metaphysical foundations”).

- “Few contemporary moral philosophers . . . have really joined battle with Nietzsche about morality. By and large we have just gone on taking moral judgements for granted as if nothing had happened. We, the philosopher watchdogs, have mostly failed to bark” —Philippa Foot⁴⁶

The twofold dignity-inviolability claim coheres well with some theistic worldviews. As Charles Taylor has explained, “[The] affirmation of universal human rights” that characterizes “modern liberal political culture” represents an “authentic development[] of the gospel.”⁴⁷ But does the claim also cohere, well or otherwise, with any secular worldview—by which I mean, here, any nontheistic worldview: either any worldview that denies, as Nietzsche denied, or even any worldview that is agnostic about, the existence of a “transcendent” reality—a reality of the sort conventionally referred to as “God”—as distinct from the reality that is or could be the object of natural scientific inquiry?⁴⁸ Bertrand Russell wrote,

That Man is the product of causes which had no prevision of the end they were achieving; that his origin, his growth, his hopes and fears, his loves and his beliefs, are but the outcome of accidental collocations of atoms; that no fire, no

46. PHILIPPA FOOT, NATURAL GOODNESS 103 (2001).

47. Charles Taylor, *A Catholic Modernity?*, in *A CATHOLIC MODERNITY?* 13, 16 (James L. Heft ed., 1999). Taylor hastens to add

that modern culture, in breaking with the structures and beliefs of Christendom, also carried certain facets of Christian life further than they ever were taken or could have been taken within Christendom. In relation to the earlier forms of Christian culture, we have to face the humbling realization that the breakout was a necessary condition of the development.

Id. For Taylor’s development of the point, with particular reference to modern liberal political culture’s affirmation of universal human rights, see *id.* at 18–19.

Consider, in the context of the statement by Charles Taylor that accompanies this footnote, that both Pope John XXIII and Pope John Paul II revered the UDHR. In his encyclical, *Pacem in Terris* (1963), John XXIII called the UDHR “an act of the highest importance.” See Avery Dulles, *Human Rights: Papal Teaching and the United Nations*, AMERICA, Dec. 5, 1998, at 14, 15. In his first encyclical, *Redemptor Hominis* (1979), John Paul II referred to the UDHR as “a magnificent effort.” *Id.* Sixteen years later, 1995, in his address to the United Nations, John Paul II described the UDHR as “one of the highest expressions of the human conscience of our time.” *Id.* In 1998, in his message for World Peace Day, John Paul II emphasized that the UDHR should be “observed integrally both in its spirit and letter.” *Id.*

48. On the idea of the “transcendent,” see generally CHARLES TAYLOR, *A SECULAR AGE* (2007); *VARIETIES OF SECULARISM IN A SECULAR AGE* (Michael Warner et al. eds., 2010).

heroism, no intensity of thought and feeling, can preserve an individual life beyond the grave; that all the labours of the ages, all the devotion, all the inspiration, all the noonday brightness of human genius, are destined to extinction in the vast death of the solar system, and that the whole temple of Man's achievement must inevitably be buried beneath the debris of a universe in ruins—all these things, if not quite beyond dispute, are yet so nearly certain, that no philosophy which rejects them can hope to stand. Only within the scaffolding of these truths, only on the firm foundation of unyielding despair, can the soul's habitation henceforth be safely built.⁴⁹

Is it the case that the dignity-inviolability claim and a Russellian worldview are like oil and water—they do not “mix”?

A.

Let us consider each part of the twofold dignity-inviolability claim, beginning with the first part, the dignity claim: Does the dignity claim cohere with any secular worldview?

The claim that every human being has inherent dignity is controversial: Not everyone believes that every human being has inherent dignity. Moreover, even among those who *do* believe it, not everyone gives the same answer to this question: *Why—in virtue of what*—does every human being have inherent dignity?

A theist may give one or another theistic answer.⁵⁰ For example, a theist may say, *Every human being is created in the image of God.*⁵¹ Or

49. BERTRAND RUSSELL, *A Free Man's Worship*, in *MYSTICISM AND LOGIC* 46, 47–48 (1918). Russell's position brings to mind one of Nietzsche's sayings:

Man a little, eccentric species of animal, which—fortunately—has its day; all on earth a mere moment, an incident, an exception without consequences, something of no importance to the general character of the earth; the earth itself, like every star, a hiatus between two nothingnesses, an event without plan, reason, will, self-consciousness, the worst kind of necessity, stupid necessity—Something in us rebels against this view; the serpent vanity says to us: “all that must be false, for it arouses indignation— Could all that not be merely appearance? And man, in spite of all, as Kant says—”

FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 169 (Walter Kaufmann ed., Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1968) (1901) (emphasis omitted).

50. Among countless examples, two from the nineteenth century are, for me, unforgettable. The first is William Gladstone:

[P]erhaps the litmus test of whether the reader is in any sense a liberal or not is Gladstone's foreign-policy speeches. . . .

In [one such speech], taken from the late 1870s, around the time of the Midlothian campaign, [Gladstone] reminded his listeners that “the sanctity of life in the hill villages of Afghanistan among the winter snows, is as inviolable in the eye of almighty God as can be your own that the law of mutual love is not limited by the shores of this island, is not limited by the boundaries of Christian civilization; that it passes over the whole surface of the earth, and embraces the meanest along with the greatest in its unmeasured scope.” By all

a theist may say, *Every human being is sacred: speaking analogically, every human being is a beloved child of God and a sister or brother to oneself.*⁵²

means smile at the oratory. But anyone who sneers at the underlying message is not a liberal in any sense of that word worth preserving.

Samuel Brittan, *Making Common Cause? How Liberals Differ, and What They Ought To Agree on*, TIMES LITERARY SUPPLEMENT, Sept. 20, 1996, at 3, 4. The second, a little earlier than Gladstone, is Herman Melville:

But this august dignity I treat of, is not the dignity of kings and robes, but that abounding dignity which has no robed investiture. Thou shalt see it shining in the arm that wields a pick or drives a spike; that democratic dignity which, on all hands, radiates without end from God; Himself! The great God absolute! The centre and circumference of all democracy! His omnipresence, our divine equality!

HERMAN MELVILLE, *MOBY DICK* 166 (Random House, Inc. 1992) (1851).

51. POPE PAUL VI, DECLARATION ON THE RELATION OF THE CHURCH TO NON-CHRISTIAN RELIGIONS (N.C.W.C. trans., 1965) (“We cannot truly call on God, the Father of all, if we refuse to treat in a brotherly way any man, created as he is in the image of God. Man’s relation to God the Father and his relation to men his brothers are so linked together that Scripture says: ‘He who does not love does not know God’ (1 John 4:8).”).

52. See MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 7–13 (2007) [hereinafter PERRY, HUMAN RIGHTS]. For a slightly revised version, see MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY 29–44 (2010) [hereinafter PERRY, POLITICAL MORALITY]; see also CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING, 1891–PRESENT: A HISTORICAL, THEOLOGICAL, AND ETHICAL ANALYSIS 132 (2002) (“Human dignity comes from God’s free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God. . . . Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor; young or old; male or female; healthy or sick.”). As philosopher Hilary Putnam has noted, the moral image central to what Putnam calls the Jerusalem-based religions “stresse[s] equality and also fraternity, as in the metaphor of the whole human race as One Family, of all women and men as sisters and brothers.” HILARY PUTNAM, THE MANY FACES OF REALISM 60–61 (1987). In their introduction *The Spirituality of the Talmud*, Ben Zion Bokser and Baruch M. Bokser state, “From this conception of man’s place in the universe comes the sense of the supreme sanctity of all human life. ‘He who destroys one person has dealt a blow at the entire universe, and he who saves or sustains one person has sustained the whole world.’” Ben Zion Bokser & Baruch M. Bokser, *Introduction* to THE TALMUD: SELECTED WRITINGS 30 (Ben Zion Bokser trans., 1989) (footnote omitted). They continue:

The sanctity of life is not a function of national origin, religious affiliation, or social status. In the sight of God, the humble citizen is the equal of the person who occupies the highest office. As one talmudist put it: “Heaven and earth I call to witness, whether it be an Israelite or pagan, man or woman, slave or maidservant, according to the work of every human being doth the Holy Spirit rest upon him.” . . . As the rabbis put it: “We are obligated to feed non-Jews residing among us even as we feed Jews; we are obligated to visit their

A nontheist, by contrast, may give one or another secular answer, such as, *Every human being, or virtually every human being, has, or at a later stage of life will have, the wondrous human capacities to love, to reason, to imagine, and the like.* Listen, for example, to philosopher James Griffin:

Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be—often, it is true, only on a small scale, but occasionally also on a large scale. And we try to realize these pictures. This is what we mean by a distinctively *human* existence—distinctive so far as we know. . . .

Human rights can then be seen as protections of our human standing or . . . our personhood.⁵³

Of course, any theistic answer to “*Why* does every human being have inherent dignity?” will be controversial, not only as between theists and nontheists but also as among theists because not all theists affirm the same theism. But every secular philosophical answer with which I am familiar—not least, James Griffin’s answer—is controversial too, not only as between theists and nontheists but also as among nontheists.

Moreover, it is open to serious question whether any secular philosophical answer can warrant the claim that *all* human beings—even infants and the severely mentally disabled—have inherent dignity.⁵⁴ And, indeed, according to Griffin, neither infants nor the severely mentally disabled have human rights—neither infants nor the severely

sick even as we visit the Jewish sick; we are obligated to attend to the burial of their dead, even as we attend to the burial of Jewish dead.”

Id. at 30–31.

53. GRIFFIN, *supra* note 21, at 32, 33.

54. See generally RAIMOND GAITA, *A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE* (2000) (suggesting that each individual is unconditionally precious); PERRY, *POLITICAL MORALITY*, *supra* note 52, at 45–57 (arguing against the secular argument that all humans have inherent dignity); PERRY, *HUMAN RIGHTS*, *supra* note 52, at 14–29 (noting that “the heart of the morality of human rights has two parts, the first of which is that every human being has inherent dignity”); WOLTERSTORFF, *supra* note 20 (defending the importance of justice as inherent rights and the importance of rights as normative bonds foundational to human community); Michael J. Perry, *Morality and Normativity*, 13 *LEGAL THEORY* 211, 215–16, 221 (2007) (suggesting that no secular arguments sufficiently answer the ground-of-normativity question); Nicholas Wolterstorff, *Can Human Rights Survive Secularization?*, 54 *VILL. L. REV.* 411 (2009) (examining whether the recognition of human rights can survive the loss of belief in God); John Dobard, *The Inheritance of Excellence: On the Uses, Justification and Problem of Human Dignity* (Oct. 22, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1580548> (“[C]ertain human beings, namely, infants, elderly persons with dementia, and the profoundly mentally disabled, have been excluded from dignity’s scope.”). But cf. ARI KOHEN, *IN DEFENSE OF HUMAN RIGHTS: A NON-RELIGIOUS GROUNDING IN A PLURALISTIC WORLD* 8–37 (2007) (analyzing secular and nonsecular conceptions of human rights).

mentally disabled are holders of human rights—because infants and the severely mentally disabled do not have a conception of themselves and of their past and future; they do not reflect and assess; they do not form pictures of what a good life would be.⁵⁵

B.

The first claim—the dignity claim—is about the status of every—born—human being; *Every human being has inherent dignity*. The second claim—the inviolability claim—is about the normative force that that status—the inherent dignity that every human being has—has for us: *Every human being is therefore inviolable: not to be violated*. According to the inviolability claim, because every human being has inherent dignity, one should not violate any human being; instead, one should respect every human being. In the words of the UDHR, “all human beings [S]hould act towards one another in a spirit of brotherhood.”⁵⁶

Does the inviolability claim cohere with any secular worldview?

The inviolability claim, like the dignity claim, is controversial. Just as not everyone believes that every human being has inherent dignity, not everyone believes that every human being is inviolable, and indeed, it may be the case that one does not believe that every human being is inviolable *because* one does not believe that every human being has inherent dignity. But even if one assumes for the sake of discussion that every human being has inherent dignity, why should one think—why should one conclude—that one should not violate any human being? We can imagine someone saying—and indeed we do not have to try very hard to imagine someone saying—*Okay, I will assume that every human being has inherent dignity. So what? What is that to me? Why should I care?* It is not enough to say, in response, *Because every human being has inherent dignity*. It is not obvious, even if one assumes that every human being has inherent dignity, why one should conclude that one should not violate any human being. One or more premises are missing. The—assumed—truth of the dignity claim does not entail the truth of the inviolability claim.

55. For critical commentary on this aspect of Griffin’s position, see Rowan Cruft, *Two Approaches to Human Rights*, 60 PHIL. Q. 176, 178–79 (2010). See generally Mark Platts, *The Languages of Rights and of Human Rights*, 85 PHILOSOPHY 319 (2010) (discussing the same).

56. UDHR, *supra* note 1, art. 1.

A theist may give one or another theistic answer. An adherent of one of the Jerusalem-based religions, which is how philosopher Hilary Putnam has referred to Judaism, Christianity, and Islam,⁵⁷ may say something to this effect: *The perfection for which God created us, the true happiness—eudemonia—that is our ultimate end, consists, in part, in discerning—in our hearts, so to speak, if not also in our minds—the Other—every “other,” every human being—as sacred—as a beloved child of God and a sister or brother to oneself—and in loving the Other. To love the Other—love not in the sense of eros or philia but of agape—is never to violate but always to respect the Other.*⁵⁸ Such an answer presupposes what is surely true: we human beings—most of us, at least—are committed to achieving our true happiness, even though we may and usually do disagree with one another—sometimes radically so—about what our true happiness consists in.

The question, again, is why, even assuming that every human being has inherent dignity, one should accept the “therefore”—why it follows from every human being’s having inherent dignity that one should not violate any human being but instead should respect every human being. Even if one rejects any theistic answer as implausible, as of course anyone will who rejects any and all theistic worldviews as implausible, it is not clear that there is any satisfactory secular answer to the question—any satisfactory secular equivalent of or alternative to a theistic answer. That a proposition coheres with—that it mixes with, that it “makes sense” in the context of—a theistic worldview does not entail that the proposition also coheres with any secular worldview. The inviolability claim—according to which one should live one’s life so as not to violate *any* human being but to respect *every* human being—coheres with some theistic worldviews. It is open to serious question, however, whether the claim coheres with any secular worldview. As Charles Taylor has put the point,

The logic of the subtraction story is something like this: Once we slough off our concern with serving God, or attending to any other transcendent reality, what we’re left with is human good, and that is what modern societies are concerned with. But this radically under-describes what I’m calling modern humanism. That I am left with only human concerns doesn’t tell me to take universal human welfare as my goal; nor does it tell me that freedom is important, or fulfillment, or equality. Just being confined to human goods could just as

57. See PUTNAM, *supra* note 52, at 60–61.

58. For an elaboration of such an answer, see PERRY, HUMAN RIGHTS, *supra* note 52, at 7–13. For a slightly revised version, see PERRY, POLITICAL MORALITY, *supra* note 52, at 29–44.

The literature on *agape* by Christian ethicists is voluminous. Two books by my Emory colleague are especially worthy of mention: TIMOTHY P. JACKSON, LOVE DISCONSOLED: MEDITATIONS ON CHRISTIAN CHARITY (1999); TIMOTHY P. JACKSON, THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE (2003).

well find expression in my concerning myself exclusively with my own material welfare, or that of my family or immediate milieu. The, in fact, very exigent demands of universal justice and benevolence which characterize modern humanism can't be explained just by the subtraction of earlier goals and allegiances.⁵⁹

* * * * *

That the International Bill of Human Rights is silent—that it is agnostic, so to speak—both about *why* every human being has inherent dignity and also about *why* every human being is *therefore* inviolable—inviolable because every human being has inherent dignity—is not surprising given the plurality of theistic and nontheistic worldviews that existed among those who bequeathed us the International Bill. Catholic philosopher Jacques Maritain reported,

[A]t one of the meetings of a UNESCO National Commission where human rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. 'Yes,' they said, 'we agree about the rights *but on condition that no one asks us why.*' That 'why' is where the argument begins.⁶⁰

However, there was agreement among those who drafted the UDHR not just about “the rights” but also about the fundamental justification of—the fundamental warrant for—the rights, namely, that every human being has inherent dignity and one therefore should not violate any human being.⁶¹ Again, the UDHR explicitly refers to “the inherent dignity . . . of all members of the human family” and states that “[a]ll human beings are born free and equal in dignity and rights . . . [A]nd should act towards one another in a spirit of brotherhood.”⁶² So the comment quoted by Maritain should have been stated thus, “Yes, we agree not only about the rights but also about the fundamental warrant for the rights. But our

59. Charles Taylor, *Closed World Structures*, in RELIGION AFTER METAPHYSICS 47, 61 (Mark A. Wrathall ed., 2003).

60. Jacques Maritain, *Introduction to HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 9 (UNESCO ed., 1949); see also GLENDON, A WORLD MADE NEW, *supra* note 22, at 73–78 (reviewing responses to UNESCO philosophers' committee request for reflections on human rights).

61. Cf. Serena Parekh, *Resisting “Dull and Torpid” Assent: Returning to the Debate over the Foundations of Human Rights*, 29 HUM. RTS. Q. 754, 763 (2007) (“Ultimately the assumption of the natural dignity of human beings became part of the UDHR despite the attempts by the drafters to keep the language neutral on this topic.”).

62. UDHR, *supra* note 1, pmb., art. 1.

agreement is no deeper than that: We do not agree about *why* every human being has inherent dignity or about *why* every human being is *therefore* inviolable.”

* * * * *

The normative claim that “all human beings . . . should act towards one another in a spirit of brotherhood” is in need of a supporting argument, an argument in response to the inevitable question: *Why* should all human beings act that way? As Yale law professor Art Leff put it almost thirty-five years ago, “Sez who?”⁶³ It is far from clear that there is any adequate secular philosophical answer—Leff argued that there is no such answer—to the question.

Let us put that question aside and consider instead this different question, which seeks not an argument but an explanation: Why do you—you who live your life, or at least, aspire to live your life, so as not to violate any human being but instead to “act towards all human beings in a spirit of brotherhood”—do so? Let us assume that the person to whom the question is addressed—“our interlocutor”—is not a theist.⁶⁴ What might our interlocutor say in response to *that* question?

Imagine our interlocutor answering along these lines: *I detest and oppose states of affairs in which human beings—any human beings, not just ourselves and those for whom we happen to have special affection, such as family, friends, and fellow countrymen—suffer grievously in consequence of a law or other policy that is misguided or worse. I detest and oppose such states of affairs because I detest and oppose such suffering. And so I work to build a world in which such suffering is, over time, diminished.*

63. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979).

64. That one is not a theist does not necessarily mean that one is not “religious” or “spiritual.” See Ronald Dworkin, *Religion Without God*, N.Y. REV. BOOKS, Apr. 4, 2013, at 67, 67. Dworkin cites footnote eleven of the U.S. Supreme Court’s decision in *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), which reads, “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”

As the Court noted in *Torcaso*, Buddhists are not, in the main, theists. Cf. Sallie B. King, *Buddhism and Human Rights*, in RELIGION AND HUMAN RIGHTS 103, 116 (John Witte, Jr. & M. Christian Green eds., 2012) (discussing Buddhist views on human rights); Laura Kittel, *Healing Heart and Mind: The Pursuit of Human Rights in Engaged Buddhism as Exemplified by Aung San Suu Kyi and the Dalai Lama*, 15 INT’L J. HUM. RTS. 905, 921 (2011) (examining the connection between Buddhist human rights advocates and spiritual practice).

Is the sensibility that animates our interlocutor's answer a sufficiently sturdy basis for keeping human rights "afloat," as poet and Nobel Laureate Czeslaw Milosz put it, "if the [religious] bottom is taken out"?

What has been surprising in the post-Cold War period are those beautiful and deeply moving words pronounced with veneration in places like Prague and Warsaw, words which pertain to the old repertory of the rights of man and the dignity of the person.

I wonder at this phenomenon because maybe underneath there is an abyss. After all, those ideas have had their foundation in religion, and I am not over-optimistic as to the survival of religion in a scientific-technological civilization. Notions that seemed buried forever have suddenly been resurrected. But how long can they stay afloat if the bottom is taken out?⁶⁵

Whatever the answer to the question that precedes the Milosz quote, is there anything in our historical experience that suggests that the sensibility in question—which may be wedded to religious faith⁶⁶ but certainly need

65. Czeslaw Milosz et al., *The Religious Imagination at 2000*, NEW PERSP. Q., Fall 1997, at 32, 32 (emphasis omitted). Consider, in connection with Milosz's worry, this statement by Jürgen Habermas, who is not a religious believer: "Among the modern societies, only those that are able to introduce into the secular domain the essential contents of their religious traditions which point beyond the merely human realm will also be able to rescue the substance of the human." Michael Reder & Josef Schmidt, *Habermas and Religion*, in AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE 1, 5 (Ciaran Cronin trans., 2010) (quoting JÜRGEN HABERMAS, POLITIK, KUNST, RELIGION: ESSAYS ÜBER ZEITGENÖSSISCHE PHILOSOPHEN 142 (1978)) (internal quotation marks omitted); cf. JÜRGEN HABERMAS, TIME OF TRANSITIONS 150–51 (Ciaran Cronin & Max Pensky eds. & trans., 2006) ("Christianity has functioned for the normative self-understanding of modernity as more than a mere precursor or a catalyst. Egalitarian universalism, from which sprang the ideas of freedom and social solidarity, of an autonomous conduct of life and emancipation, of the individual morality of conscience, human rights, and democracy, is the direct heir to the Judaic ethic of justice and the Christian ethic of love. This legacy, substantially unchanged, has been the object of continual critical appropriation and reinterpretation. To this day, there is no alternative to it. And in light of the current challenges of a postnational constellation, we continue to draw on the substance of this heritage. Everything else is just idle postmodern talk.").

66. Cf. Jack Mahoney, *Evolution, Altruism, and the Image of God*, 71 THEOLOGICAL STUD. 677, 701 (2010) ("[W]herever and whenever it is to be found, human altruism or generosity, the breakout from any evolutionary self-obsession, can be seen as a reflection of, and participation in, the creative altruism and *agape* of God himself.").

not be⁶⁷—is a less sturdy basis than theism has been for keeping human rights afloat?⁶⁸

Nonetheless, one might say, the problem of justification persists: the justification of the sensibility. Listen, for example, to Leszek Kolakowski:

When Pierre Bayle argued that morality does not depend on religion, he was speaking mainly of psychological independence; he pointed out that atheists are capable of achieving the highest moral standards . . . and of putting to shame most of the faithful Christians. That is obviously true as far as it goes, but this matter-of-fact argument leaves the question of validity intact⁶⁹

Listen, too, to John Rist: “Although a ‘moral saint’ may exist without realist (and therefore religious) beliefs, yet his stance as moral saint cannot be justified without recourse to realism.”⁷⁰

To what Kolakowski calls “the question of validity,”⁷¹ imagine our interlocutor responding, *Again, I detest and oppose states of affairs in which any human beings suffer grievously in consequence of a law or other policy that is misguided or worse. You ask what justifies my sensibility—what justifies my way of being oriented in the world; in particular, my way of being oriented to the Other—if indeed anything justifies it. Are you asking for an argument in support of the claim—which for me is a conviction—that there is no more fitting way, no more truly, deeply satisfying way, for a human being to be oriented in the world? But I have nothing to offer you other than my experience, both my experience—from the “inside,” as it were—of the sensibility⁷² and*

67. See KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY* 121–22 (1996).

68. See Omer Bartov & Phyllis Mack, *Introduction to IN GOD’S NAME: GENOCIDE AND RELIGION IN THE TWENTIETH CENTURY* 1, 1 (Omer Bartov & Phyllis Mack eds., 2001) (“[R]eligion has played an important role in several outbreaks of genocide since World War I.”); see also *id.* (“Violence and religion have been closely associated in a variety of intricate, often contradictory ways, since the earliest periods of human civilization. Institutionalized religions have practiced violence against both their adherents and their real or imagined opponents. Conversely, religions have also been known to limit social and political violence and to provide spiritual and material comfort to its victims. Religious faith can thus generate contradictory attitudes, either motivating aggression or constraining it. Individual perpetrators and victims of violence can seek in religious institutions and personal faith both a rationale for atrocity, a justification to resist violence, or a means to come to terms with the legacy of destruction by integrating it into a wider historical or theological context.”).

69. LESZEK KOLAKOWSKI, *RELIGION: IF THERE IS NO GOD . . . ON GOD, THE DEVIL, SIN AND OTHER WORRIES OF THE SO-CALLED PHILOSOPHY OF RELIGION* 191–92 (1982).

70. RIST, *supra* note 45, at 267 (emphasis omitted); cf. *id.* at 2 (“[Plato] came to believe that if morality, as more than ‘enlightened’ self-interest, is to be rationally justifiable, it must be established on metaphysical foundations . . .”).

71. KOLAKOWSKI, *supra* note 69, at 191.

72. The deliverances of evolutionary biology are relevant here. See Frans de Waal, *Morally Evolved: Primate Social Instincts, Human Morality, and the Rise and Fall of*

my experience—from the “outside”—of others, such as the Dalai Lama and Thich Nhat Hanh, who embody the sensibility, my experience of their deep, transformative humanity and peace?⁷³ There is much to be done, and life is short. So I work to build a world in which such suffering is, over time, diminished. And I work to build that world with anyone who will work with me, whatever their particular beliefs or motivation.

Our interlocutor’s sensibility is, as the response indicates, an aspect of a particular way of being oriented in the world; more precisely, the sensibility is a particular way of being oriented to the Other. Let us call the sensibility “agapic.” The kind of love called *agape* discloses to us “the full humanity of others. To become properly aware of that full humanity is to become incapable of treating it with contempt, cruelty or indifference. The full awareness of others’ humanity that [*agape*] involves is an essentially motivating perception.”⁷⁴ Listen, in that regard, to something Graham Greene wrote in *The Power and the Glory*: “When you visualized

“Veneer Theory,” in PRIMATES AND PHILOSOPHERS: HOW MORALITY EVOLVED 1, 15 (Stephen Macedo & Josiah Ober eds., 2006) (“The evolutionary origin of this inclination is no mystery. All species that rely on cooperation—from elephants to wolves and people—show group loyalty and helping tendencies. These tendencies evolved in the context of a close-knit social life in which they benefited relatives and companions able to repay the favor. The impulse to help was therefore never totally without survival value to the ones showing the impulse. But, as so often, the impulse became divorced from the consequences that shaped its evolution. This permitted its expression even when payoffs were unlikely, such as when strangers were beneficiaries. This brings animal altruism much closer to that of humans than usually thought, and explains the call for the temporary removal of ethics from the hands of philosophers.”); see also FRANS DE WAAL, THE AGE OF EMPATHY 4–5 (2009) (discussing the interaction between biology and human nature); FRANS DE WAAL, THE BONOBO AND THE ATHEIST: IN SEARCH OF HUMANISM AMONG THE PRIMATES 4–7 (2013) [hereinafter DE WAAL, THE BONOBO AND THE ATHEIST] (examining altruism and morality in primates); Frans B.M. de Waal, *Putting the Altruism Back into Altruism: The Evolution of Empathy*, 59 ANN. REV. PSYCHOL. 279, 284 (2008) (discussing concern for others observed in mammals); Frans de Waal, *Morals Without God?*, N.Y. TIMES (Oct. 17, 2010, 5:15 PM), http://opinionator.blogs.nytimes.com/2010/10/17/morals-without-god?_r=0 (arguing that religion “is an add-on rather than the wellspring of morality,” using primates as an example).

On what experimental psychology has, and has not, revealed about the possibility of altruism, see generally Stephen Stich, John M. Doris, & Erica Roedder, *Altruism*, in THE MORAL PSYCHOLOGY HANDBOOK 147 (2010).

73. See, e.g., THICH NHAT HANH, THICH NHAT HANH: ESSENTIAL WRITINGS (Robert Ellsberg ed., 2001).

74. Timothy Chappell, Book Review, 111 MIND 411, 412 (2002) (reviewing RAIMOND GAITA, A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE (2000)) (emphasis added). In the quoted passage, Chappell is describing “Gaita’s view” and says that it is “reminiscent of course of Simone Weil and Iris Murdoch.” *Id.*

a man or woman carefully, you could always begin to feel pity When you saw the lines at the corners of the eyes, the shape of the mouth, how the hair grew, it was impossible to hate. Hate was just a failure of imagination.”⁷⁵ Listen, too, to the poet Denise Levertov: “Man’s capacity for evil . . . is less a positive capacity . . . than a failure to develop man’s most [fundamental] human function, the imagination, to its fullness, and consequently a failure to develop compassion.”⁷⁶

Compare, to the agapic orientation to the Other, Doktor Pannwitz’s orientation—Pannwitz, the German chemist before whom Primo Levi stood at Auschwitz: “To Doktor Pannwitz, the prisoner standing there, before the desk of his examiner, is not a frightened and miserable man. He is not a dangerous or inferior or loathsome man either, condemned to prison, torture, punishment, or death. He is, quite simply, not a man at all.”⁷⁷

Our interlocutor does not understand her agapic sensibility to be rooted in—to be the yield of—either theistic or secular philosophical argument. This is not to deny that unlike our interlocutor, some with such a sensibility may “rationalize” the sensibility with theistic or secular philosophical argument.⁷⁸ Indeed, for all we know, our interlocutor—who, recall, is not a theist—is deeply skeptical about the capacity of the secular philosophical argument to “justify” her agapic sensibility.⁷⁹ In any event, our interlocutor’s fundamental warrant for her agapic sensibility is neither theistic nor secular philosophical argument but instead, as her

75. GRAHAM GREENE, *THE POWER AND THE GLORY* 131 (Penguin Books 2003) (1940).

76. DENISE LEVERTOV, *THE POET IN THE WORLD* 53 (6th prtg. 1973).

77. See ALAIN FINKIELKRAUT, *IN THE NAME OF HUMANITY: REFLECTIONS ON THE TWENTIETH CENTURY* 1, 2 (Judith Friedlander trans., 2000).

78. Cf. DE WAAL, *THE BONOBO AND THE ATHEIST*, *supra* note 72, at 219–20, 239 (arguing that morality came before gods). For an example of a theistic “rationalization” of the agapic sensibility, see *supra* text accompanying notes 50–52.

79. Cf. RICHARD JOYCE, *THE MYTH OF MORALITY*, at x–xi (2001) (calling morality “precious and consequential” but a myth); Richard Joyce, *Morality, Schmorality*, in *MORALITY AND SELF-INTEREST*, *supra* note 14, at 51 (analyzing the relationship between morality and self-interest from the perspective of a moral error theorist); Brian Leiter, *The Boundaries of the Moral (and Legal) Community*, 64 *ALA. L. REV.* 511, 511 (2013) (noting that those in Western society “have largely abandoned the ideas that gender, race, ethnicity, religion, class, and now even sexual orientation are *morally relevant* attributes in the sense that they are attributes that determine the basic moral consideration to which one is entitled”); Jesse J. Prinz, *Constructive Sentimentalism: Legal and Political Implications*, in *PASSIONS AND EMOTIONS* 3 (James E. Fleming ed., 2013) (analyzing empirical evidence linking emotions to moral judgment); Brian Leiter, *Nietzsche Against the Philosophical Canon* 1–8 (Apr. 8, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2254398> (discussing Nietzsche’s objections to Socrates).

response to “the question of validity” indicates, her experience, both from the “inside” and from the “outside.”

Because many theists are in the grip of the agapic sensibility, it bears emphasis that, as the case of our interlocutor illustrates, one need not be a theist to be in its grip. Many of the rescuers interviewed by Kristen Renwick Monroe—many of the European non-Jews who during the Holocaust, at great risk to themselves and their families, rescued Jews—did not self-identify as theists or did not offer any theistic explanation of, much less warrant for, their agapic sensibility.⁸⁰ Moreover, there are many who fit this profile: was a theist in the grip of the agapic sensibility, no longer a theist but still in the grip—no less in the grip—of the agapic sensibility.

* * * * *

This is the question with which I began: Why should one live one’s life—what reason or reasons does one have, if any, to live one’s life—in accord with what Article 1 of the UDHR states that “all human beings” should do, namely, “act towards one another in a spirit of brotherhood”?

This is the different question to which I later turned, which, as I said, invites not argument but explanation: Why do you live your life—or, at least, aspire to live your life—so as not to violate any human being but instead to “act towards all human beings in a spirit of brotherhood”?

The agapic sensibility—the agapic orientation to the Other—provides, I am increasingly inclined to think, the deepest nontheistic explanation for why one aspires to live life so as to “act towards all human beings in a spirit of brotherhood.” And perhaps, even for many theists, the deepest explanation is this: To repeat, many who once were theists but are no longer remain well and comfortably within the grip of the agapic sensibility.⁸¹

80. See KRISTEN RENWICK MONROE, ETHICS IN AN AGE OF TERROR AND GENOCIDE: IDENTITY AND MORAL CHOICE 3 (2012); Kristen Renwick Monroe, *Explicating Altruism*, in ALTRUISM & ALTRUISTIC LOVE: SCIENCE, PHILOSOPHY, & RELIGION IN DIALOGUE 106, 109 (Stephen G. Post et al. eds., 2002). See generally KRISTEN RENWICK MONROE, THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY (1996) (describing Otto Springer, a German man who saved over one hundred Jewish people during the Holocaust as “not religious” but “some combination of agnostic, Kantian, and pantheist”).

81. That one is no longer a theist does not necessarily mean that one is no longer “religious” or “spiritual.” See Dworkin, *supra* note 64.

Again, *agape* is a kind of love—different, to be sure, from *eros* and *philia* but a kind of love nonetheless.⁸² Is it surprising that in trying to discern—to excavate—the deepest nontheistic ground of human rights, and perhaps the deepest ground of any sort, we have reached an orientation to the Other—a sensibility—so fittingly expressed in the language of love? That language provides strong support—stronger support, perhaps, than any other language—for the morality of human rights. Indeed, perhaps the language of love provides indispensable support for the morality of human rights, as Australian philosopher Raimond Gaita, who is a nontheist, seems to suggest:

[T]he language of love which compels us to affirm that even those who suffer affliction so severe that they have irrecoverably lost everything that gives sense to our lives, and the most radical evil-doers, are fully our fellow human beings. On credit, so [to] speak, from this language of love, we have built a more tractable structure of rights and obligations. If the language of love goes dead on us, however, if there are no examples to nourish it, either because they do not exist or because they are no longer visible to us, then talk of inalienable natural rights or of the unconditional respect owed to rational beings will seem lame and improbable to us. Indeed, exactly that is happening.⁸³

APPENDIX

THE INTERNATIONALIZATION OF HUMAN RIGHTS A BRIEF OVERVIEW

The name of my state of origin—Kentucky—has been said to derive from a Native American word meaning “a dark and bloody ground.” An apt name for our century of origin is a dark and bloody time—indeed, *the* dark and bloody time: The twentieth century “‘was the bloodiest century in human existence,’ . . . not only because of the number of deaths attributed

82. To love another—love in the sense of *agape*—is not necessarily to feel a certain way, but it is necessarily to act a certain way. Cf. Jeffrie G. Murphy, *Law Like Love*, 55 SYRACUSE L. REV. 15, 21 (2004) (“There are, of course, many fascinating questions that could be raised about the love commandment. Does it command love as an emotion or simply that we act in a certain way? Kant, convinced that we can be morally bound only to that which is in our control . . . called emotional love *pathological love* and claimed that it could not be our duty to feel it. What is actually commanded he called *practical love*—which is simply acting morally as Kant conceived acting morally.”). Murphy explained to me in discussion that by *pathological*, which is the English word commonly used to translate the German word Kant used, Kant did not mean diseased or sick but simply something from our passions with respect to which we are passive and thus not in voluntary control.

83. GAITA, *supra* note 54, at xviii–xix.

to wars—109 million—but because of the fraction of the population killed by conflicts, more than 10 times as great as during the 16th century.”⁸⁴

The list of twentieth-century horrors includes much more than wars, however. As the century began, King Leopold II of Belgium was presiding over a holocaust in the Congo; it is estimated that between 1880 and 1920, because of a system of slave labor, the population of the Congo “dropped by approximately ten million people.”⁸⁵ From 1915 to 1923, the Ottoman Turks, who were Muslim, committed genocide against the Armenian minority, who were Christian.⁸⁶ Not counting deaths inflicted in battle, the Soviet Union’s Joseph Stalin was responsible for the deaths of over 42 million people, 1929–1953; China’s Mao Zedong, over 37 million, 1923–1976; and Germany’s Adolf Hitler, over 20 million, 1933–1945, including over 10 million Slavs and about 5.5 million Jews.⁸⁷

84. Kim A. McDonald, *Anthropologists Debate Whether, and How, War Can Be Wiped Out*, CHRON. HIGHER EDUC., Dec. 3, 1999, at A21 (quoting Carolyn R. Nordstrom, professor of anthropology at the University of Notre Dame).

85. ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* 233 (1998). The causes—all of them related to the system of slave labor—were several: murder, starvation, exhaustion, exposure, disease, and a plummeting birth rate. *See id.* at 225–34. As Hochschild observes, this was “a death toll of Holocaust dimensions.” *Id.* at 4. The holocaust in the Congo was not an isolated event. *See, e.g.*, Ross A. Sloten, *AIDS in Namibia*, 41 SOC. SCI. & MED. 277, 277 (1995) (“In 1884, Namibia formally became a German colony and was known as German South West Africa. During the time of annexation, the Herero and Nama peoples were the largest tribes, inhabiting the most desirable land, which the Germans gradually expropriated between 1893 and 1903. This expropriation led to many battles, culminating in the intentional genocide of 60% of the population. To this day, the Hereros and Namas have not recovered their original numerical strength.” (footnotes omitted)); Giles Foden, *Rehearsal for Genocide: A Novel About German Brutality in Colonial Africa*, N.Y. TIMES BOOK REV., Apr. 20, 2003, at 15, 15 (book review).

86. *See* 1 ENCYCLOPEDIA OF GENOCIDE 61–105 (Israel W. Charny ed., 1999); *see also* PETER BALAKIAN, *THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA’S RESPONSE* 243 (2003) (illustrating the violence against Armenian Christians).

87. *See* R. J. Rummel, *Power Kills, Absolute Power Kills Absolutely*, in 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 86, at 23, 29 tbl.5 [hereinafter Rummel, *Power Kills*]; R. J. Rummel, *The Nazi Genocide State*, in 2 ENCYCLOPEDIA OF GENOCIDE 437, 439 (Israel W. Charny ed., 1999) (“[The Nazi] genocides likely cost the lives of about 16,300,000 people: nearly 5,300,000 Jews, 260,000 Gypsies, 10,500,000 Slavs, and 220,000 homosexuals as well as another 10,000 handicapped Germans.”); *see also* Ian Kershaw, *Afterthought: Some Reflections on Genocide, Religion, and Modernity*, in IN GOD’S NAME: GENOCIDE AND RELIGION IN THE TWENTIETH CENTURY 372, 377 (Omer Bartov & Phyllis Mack eds., 2001) (“The Nazi genocide against the Jews—the Holocaust, as it has generally come to be known as—is estimated to have resulted in the murder of about five

One need only mention these places to recall some more recent atrocities: Cambodia, 1975–1979, Bosnia, 1992–1995, Rwanda, 1994, and in the early years of the twenty-first century, the Darfur region of Sudan.⁸⁸

Sadly, there is so much more.⁸⁹ For an exhaustive and exhausting account of the grim—indeed, horrific—details, one can consult the two-volume *Encyclopedia of Genocide*, which reports,

In total, during the first eighty-eight years of [the twentieth] century, almost 170 million men, women, and children were shot, beaten, tortured, knifed, burned, starved, frozen, crushed, or worked to death; buried alive, drowned, hanged, bombed, or killed in any other of the myriad ways governments have inflicted death on unarmed, helpless citizens and foreigners. Depending on whether one uses high or more conservative estimates, the dead could conceivably be nearly 360 million people. It is as though our species has been devastated by a modern Black Plague.⁹⁰

and a half million Jews in Nazi-occupied Europe, around half the number targeted in the notorious Wannsee Conference of January 1942.”)

In *Bloodlands: Europe Between Hitler and Stalin*, historian Timothy Snyder writes, “Today there is widespread agreement that the mass killing of the twentieth century is of the greatest moral significance for the twenty-first. How striking, then, that there is no history of the bloodlands.” TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN*, at xix (2010). Thanks to Snyder’s extensive, searing account, we now have that history. For an informative review of Snyder’s book, see generally Anne Applebaum, *The Worst of the Madness*, N.Y. REV. BOOKS, Nov. 11, 2010, at 8 (book review).

88. For a narrative of the failures of the United States to respond to genocides, see generally SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2002).

89. See, e.g., IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997); MARK DANNER, *THE MASSACRE AT EL MOZOTE: A PARABLE OF THE COLD WAR* (1994); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA*, at viii (2002) (“Through 1944, when lynchings first began to decline strongly, [the Tuskegee Institute] recorded 3,417 lynchings of blacks Not until 1952 did a year pass without a single recorded lynching.”). See generally JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* (1999) (“The twentieth-century history of large-scale cruelty and killing is only too familiar: the mutual slaughter of the First World War, the terror-famine of the Ukraine, the Gulag, Auschwitz, Dresden, the Burma Railway, Hiroshima, Vietnam, the Chinese Cultural Revolution, Cambodia, Rwanda, the collapse of Yugoslavia.”).

90. Rummel, *Power Kills*, *supra* note 87, at 28. On genocide in particular, see Roger W. Smith, *American Self-Interest and the Response to Genocide*, CHRON. HIGHER EDUC., July 30, 2004, at B6 (“[G]enocide—intentional acts to eliminate in whole, or in substantial part, a specific human population—had claimed the lives of some 60 million people in the 20th century, 16 million of them since 1945, when the watchword was ‘Never again.’ Genocide has, in fact, been so frequent, the number of victims so extensive, and serious attempts to prevent it so few, that many scholars have described the 20th century as ‘the age of genocide.’”). See generally DANIEL JONAH GOLDHAGEN, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY* (2009) (discussing modern mass murders and “eliminationist projects”).

The twentieth century was not only a dark and bloody time, however. Beginning in the middle of the twentieth century, a growing number of countries around the world responded to the savage horrors of the twentieth century by recognizing certain rights as human rights and enshrining them in constitutions or treaties, thereby rendering the moral landscape of the twentieth century a touch less bleak.⁹¹

The first major event in the internationalization of human rights took place on June 26, 1945, shortly before the end of the Second World War⁹²: the signing of the Charter of the United Nations, which entered into force four months later, on October 24. These are the salient U.N. Charter provisions for present purposes:

- “We the peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”⁹³
- “The Purposes of the United Nations are . . . [t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”⁹⁴
- “The General Assembly shall initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁹⁵
- “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . , the United Nations shall promote . . . universal respect for, and observance of, human rights

91. For a brief account of the “historical antecedents” of international human rights, see BUERGENTHAL ET AL., *supra* note 12, at 1–28.

92. Although the European phase of the Second World War ended in May 1945, the Pacific phase continued into the summer. In August 1945, the United States inaugurated nuclear warfare by dropping two atomic bombs on Japan: the first—“Little Boy”—on Hiroshima, on August 6, the second—“Fat Man”—on Nagasaki, on August 9.

93. U.N. Charter pmbl.

94. *Id.* art. 1, para. 3.

95. *Id.* art. 13, para. 1.

and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁹⁶

- “All Members pledge themselves to take joint and separate action in cooperation with the [United Nations] for the achievement of the purposes set forth in Article 55.”⁹⁷
- “[The Economic and Social Council] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.”⁹⁸
- “The Economic and Social Council shall set up commissions . . . for the promotion of human rights”⁹⁹

Although some of the foregoing provisions refer to “fundamental freedoms” as well as to “human rights,” a fundamental freedom, within the meaning of the U.N. Charter, is one kind of human right: the right to the freedom to engage in a specified activity, such as the practice of one’s religion or the criticism of one’s government.

The U.N. Charter does not specify the human rights to which it refers. Moreover, in 1945 there was no internationally approved list of human rights to which the drafters of the charter were referring. Therefore, the charter obviously needed to be—and soon was—complemented by another document.

The second major event in the internationalization of human rights took place on December 10, 1948: the adoption, by the General Assembly of the United Nations, of the Universal Declaration of Human Rights (UDHR).¹⁰⁰ The vote was forty-eight for, zero against, and eight abstentions.

The abstainers were all the Soviet bloc states—Byelorussia, Czechoslovakia, Poland, Ukraine, and the USSR, as well as Yugoslavia, South Africa, and Saudi Arabia. “Two countries, Honduras and Yemen, were absent.”¹⁰¹

96. *Id.* art. 55.

97. *Id.* art. 56.

98. *Id.* art. 62, para. 2.

99. *Id.* art. 68.

100. For insightful, historically informed commentary on several provisions of the UDHR and on the relationship among the provisions, see GLENDON, *A WORLD MADE NEW*, *supra* note 22, at 173–92; *see also* MORSINK, *supra* note 26, at ix–xiv (heralding the success of the UDHR in the decades after its drafting).

For an overview of recent work on the history of human rights and criticism of some of the most prominent instances of such work, *see generally* Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 *HARV. L. REV.* 2043 (2013) (book review).

101. GLENDON, *A WORLD MADE NEW*, *supra* note 22, at 170.

The abstentions by South Africa and Saudi Arabia from the final vote approving the Declaration had been early warnings of more trouble ahead. South Africa had objected, among other things, to the word “dignity,” apparently fearing its implications for the apartheid system it was then constructing. And Saudi Arabia had claimed that some of the so-called universal rights, particularly the right to change one’s religion, were really just “Western” ideas.¹⁰²

“The Soviet abstention, [Eleanor] Roosevelt believed, was attributable mainly to one article that ‘they couldn’t possibly accept’: Article 13, which provides that everyone has the right to leave his country.”¹⁰³

The U.N. Charter’s several references to “human rights and fundamental freedoms” and the UDHR’s specification of those rights and freedoms marked a dramatic break—or, at least, the beginning of a dramatic break—with the past: “Until World War II, most legal scholars and governments affirmed the general proposition, albeit not in so many words, that international law did not impede the natural right of each equal sovereign to be monstrous to his or her subjects.”¹⁰⁴ As Yale legal scholar Michael Reisman has explained,

[T]he general assumption [prior to the end of World War II] had been that, short of certain excesses, what a government did to its own people was, for the most part, its own business. In 1942, for example, a member of the British House of Commons characterized Adol[f] Hitler’s treatment of Jews of Allied nationality as a matter of international concern but characterized the treatment of Jews of Axis nationality as no one else’s business; it was a domestic matter. Since 1945, that conception has, for the most part, changed. The basic proposition of the contemporary international law of human rights is that a government may no longer do anything simply because it is effective and promises to achieve its purpose or enhance its power vis-à-vis its own population as long as it is doing it only to its citizens and in its own territory. In order to qualify for the name of government, a government now has to meet certain standards, all of which involve restraints on the use of power: no torture, no brutalization; no seizure of property; no state terror; no discrimination on the basis of race,

102. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 8 (1999).

103. GLENDON, A WORLD MADE NEW, *supra* note 22, at 170 (quoting Eleanor Roosevelt, Representative of the U.S. on the United Nations Comm’n on Human Rights, Making Human Rights Come Alive (Apr. 1, 1949), in WHAT I HOPE TO LEAVE BEHIND: THE ESSENTIAL ESSAYS OF ELEANOR ROOSEVELT 559, 565–66, 573 (Allida M. Black ed., 1995)).

104. Tom J. Farer & Felice Gaer, *The UN and Human Rights: At the End of the Beginning*, in UNITED NATIONS, DIVIDED WORLD: THE UN’S ROLES IN INTERNATIONAL RELATIONS 240, 240 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

religion, or sex; no prevention of people leaving a particular country, and so on.¹⁰⁵

In the postwar period, the plausibility of arguing that South Africa's racial apartheid—to name but one prominent example—was “no one else's business” would eventually disappear.¹⁰⁶ Listen, in that regard, to Thorbjorn Jagland, Chair of the Norwegian Nobel Committee, in an op-ed in the *New York Times*, October 23, 2010, titled *Why We Gave Liu Xiaobo a Nobel*:

The Chinese authorities' condemnation of the Nobel committee's selection of Liu Xiaobo, the jailed political activist, as the winner of the 2010 Peace Prize inadvertently illustrates why human rights are worth defending.

The authorities assert that no one has the right to interfere in China's internal affairs. But they are wrong: international human rights law and standards are above the nation-state, and the world community has a duty to ensure they are respected.

The modern state system evolved from the idea of national sovereignty established by the Peace of Westphalia in 1648. At the time, sovereignty was assumed to be embodied in an autocratic ruler.

But ideas about sovereignty have changed over time. The American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen replaced the control of the autocrat with the sovereignty of the people as the source of national power and legitimacy.

The idea of sovereignty changed again during the last century, as the world moved from nationalism to internationalism. The United Nations, founded in the wake of two disastrous world wars, committed member states to resolve disputes by peaceful means and defined the fundamental rights of all people in

105. W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 391–92 (1987) (footnote omitted).

106. Cf. Henry J. Steiner, Twentieth Anniversary Reflections, *Human Rights: The Deepening Footprint*, 20 HARV. HUM. RTS. J. 7, 12 (2007) (“There was a time in South Africa when some protested that in and of itself, debate about apartheid in the U.N. constituted unjustified intervention in violation of international law and of a long-standing conception of state sovereignty. Those days are long distant; such a claim today would be little short of ludicrous. That the earlier arguments now strike students as implausible, even bizarre, constitutes striking evidence of the movement's entrenchment. The prevalence of this new discourse and its widespread institutionalization in [intergovernmental organizations, nongovernmental organizations], state governments, academia, and popular debates bode well for the movement, despite its abundant problems. As ideas become implanted, they inform and shape popular beliefs as well as popular visions of what may be possible. They form part of the education of the young about the world they are entering. Such ideas can animate, inspire, empower. They can generate criticism, protest, and change. The ideals that gave birth to the movement, and the discourse expressing them, continue as the movement's most effective weapons.”).

the Universal Declaration of Human Rights. The nation-state, the declaration said, would no longer have ultimate, unlimited power.

Today, universal human rights provide a check on arbitrary majorities around the world, whether they are democracies or not. A majority in a parliament cannot decide to harm the rights of a minority, nor vote for laws that undermine human rights. And even though China is not a constitutional democracy, it is a member of the United Nations, and it has amended its Constitution to comply with the Declaration of Human Rights.¹⁰⁷

The internationalization of human rights did not end in 1948 with the adoption of the UDHR. Eighteen years later, in 1966, the U.N. General Assembly adopted three treaties: the International Covenant on Civil and Political Rights (ICCPR), an optional protocol to the ICCPR—originally referred to as “the Optional Protocol” to the ICCPR but now often referred to as “the (First) Optional Protocol” because in 1989 the U.N. General Assembly adopted the Second Optional Protocol to the ICCPR—and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, the ICCPR and the ICESCR represent a sustained elaboration of the rights more briefly articulated in the UDHR, which is not a treaty but only what its name indicates: a “declaration.” By 1976, each of the three treaties had attracted a sufficient number of state parties to enter into force.¹⁰⁸ As of March 2013, there were 167 parties to the ICCPR, including, as of 1992, the United States; 114 parties to the (First) Optional Protocol to the ICCPR; and 160 parties to the ICESCR. In 1989, the U.N. General Assembly adopted the Second Optional Protocol to the ICCPR, “aiming at the abolition of the death penalty.” In 1991, the protocol entered into force; as of December 2012, there were 75 parties to the protocol.

On the website of the Office of the United Nations High Commissioner for Human Rights, there is a list of five documents under the heading “The International Bill of Human Rights”—the UDHR and the four treaties referenced in the preceding paragraph: the ICCPR, the (First) Optional Protocol to the ICCPR, the Second Optional Protocol to the ICCPR, and the ICESCR.¹⁰⁹ The ICCPR and the ICESCR are called “covenants”—

107. Thorbjorn Jagland, Op-Ed., *Why We Gave Liu Xiaobo a Nobel*, N.Y. TIMES, Oct. 23, 2010, at A21.

108. An international human rights treaty typically enters into force, as among the parties to the treaty, when a specified number of countries—a number specified in the text of the treaty—becomes parties to the treaty.

109. *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights*, OFF. HIGH COMMISSIONER FOR HUM. RTS. (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

rather than “conventions,” which is the standard title for the other U.N.-sponsored human rights treaties—to mark their singular importance, along with the UDHR, as the foundational documents of international human rights.

The treaties listed under the heading “The International Bill of Human Rights” are not the only, or even the earliest, international human rights treaties. Here, in the order in which they were adopted by the U.N. General Assembly, is a list of the other principal treaties now in force, along with their optional protocols now in force and the names of the bodies responsible for monitoring compliance with them. The year each treaty or protocol entered into force is indicated, as is the number of state parties to each treaty and protocol as of March 2013.

- Convention on the Prevention and Punishment of the Crime of Genocide—1951; 142 parties, including, as of 1988, the United States—no monitoring body.
- International Convention on the Elimination of All Forms of Racial Discrimination—1969; 175 parties, including, as of 1994, the United States—Committee on the Elimination of Racial Discrimination.
- Convention on the Elimination of All Forms of Discrimination against Women—1981; 187 parties but not the United States—Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women—2000; 104 parties but not the United States—Committee on the Elimination of Discrimination against Women.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—1987; 153 parties, including, as of 1994, the United States—Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—2006; 67 parties but not the United States—Committee against Torture.
- Convention on the Rights of the Child—1990; 193 parties but not the United States¹¹⁰—Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict—2002; 151 parties, including, as of 2002, the United States—Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution

110. The Convention on the Rights of the Child has more parties than any other U.N.-sponsored human rights treaty. Only the United States and Somalia are not parties. On the convention, see generally Ursula Kilkelly, *The CRC at 21: Assessing the Legal Impact*, 62 N. IR. LEGAL Q. 143 (2011).

and child pornography—2002; 163 parties, including, as of 2002, the United States—Committee on the Rights of the Child.

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families—2003; 46 parties but not the United States—Committee on Migrant Workers.
- Convention on the Rights of Persons with Disabilities—2008; 130 parties but not the United States—Optional Protocol to the Convention on the Rights of Person with Disabilities—2008; 76 parties but not the United States—Committee on the Rights of Persons with Disabilities.
- International Convention for the Protection of All Persons from Enforced Disappearance—2010; 37 parties but not the United States—Committee on Enforced Disappearances.¹¹¹

To appreciate fully the breadth of the internationalization of human rights in the second half of the twentieth century, it is important to understand that the U.N. human rights system is not the only human rights system. There are four transnational—or as they are often called, regional—human rights systems: European, Inter-American, African, and Arab.¹¹²

111. For a recent argument that the UDHR “and subsequent documents building upon the UDHR’s mandate have not had identifiable impact on the structures of violence and misery that continue to plague humanity,” see Ibrahim J. Gassama, *A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism*, 37 *BROOK. J. INT’L L.* 407, 408 (2012).

Whatever measure of success they may claim has been in areas far from those who most need the promises of the UDHR and its progenies. The numerous covenants, conventions, treaties, agreements, protocols, resolutions, and other similar indicia of accomplishments by lawyers and diplomats and activists have not prevented recurring genocide, crimes against humanity, ethnic cleansing, widespread torture, famine, trafficking, and the like from happening. A world of abject poverty, millions of people dying from preventable ills, environmental exploitation and destruction, and unfettered violence remain a well-tolerated part of our global order.

Id. at 456.

112. Of the four, the European and the Inter-American systems are the most developed. The newest of the four—the Arab human rights system—is the least developed. For a succinct introduction to the regional human rights systems, see BUERGENTHAL ET AL., *supra* note 12, at 160–373. For a lengthy study, see generally DINAH SHELTON, *REGIONAL PROTECTION OF HUMAN RIGHTS* (2008). For an excellent set of materials on the most developed of the four regional systems, see generally MARK W. JANIS, RICHARD

Moreover, if the legal system of a country articulates and enforces human rights, that legal system is, in part, a human rights system. Because the legal system of Canada, for example, articulates and enforces human rights, the Canadian legal system is, in part, a human rights system.¹¹³ And, indeed, the legal system of virtually every country in the world articulates and enforces, or purports to enforce, human rights: “Human rights are enshrined in the constitutions of virtually every one of [the world’s] states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor, developed, developing, and less developed.”¹¹⁴

S. KAY & ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* (3d ed. 2008).

Will there soon be a fifth regional human rights system? *See generally* Diane A. Desierto, *ASEAN’s Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter*, 49 COLUM. J. TRANSNAT’L L. 268 (2011) (discussing the issues related to “ASEAN Law” and concluding that these issues could impede “Southeast Asia’s vast potential to contribute to the project of constitutionalizing international law”); Yuval Ginbar, *Human Rights in ASEAN—Setting Sail or Treading Water?*, 10 HUM. RTS. L. REV. 504 (2010) (aiming to gain insight into the “promises, and perhaps risks” posed by ASEAN by “chart[ing] regional human rights developments in ASEAN and provid[ing] a brief overview of the key instruments adopted so far”); Yung-Ming Yen, *The Formation of the ASEAN Intergovernmental Commission on Human Rights: A Protracted Journey*, 10 J. HUM. RTS. 393 (2011) (analyzing the evolution of ASEAN). “ASEAN” is the Association of Southeast Asian Nations.

113. Canada’s Charter of Rights and Freedoms, which is part of the Canadian Constitution, articulates many human rights that are judicially enforced.

114. LOUIS HENKIN, *THE AGE OF RIGHTS*, at ix (1990). As a practical matter, however, that a right is enshrined in a constitution too often means little, if anything. *See* David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 865–72 (2013); *cf.* Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, 41 J. LEGAL STUD. 131 (2012) (finding “strong evidence of a systematic increase in rights violations in the United States and its ally countries after 9/11”).

It is a promising development that over one hundred countries have established what are known as National Human Rights Institutions (NHRIs): administrative institutions whose responsibilities include monitoring, and making recommendations with respect to, the human rights situation in the country, including the country’s compliance, or not, with its international commitments, and receiving and investigating complaints from individuals and groups that their human rights have been, or are being, violated. On NHRIs and their recent growth, *see* HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS (Ryan Goodman & Thomas Pegram eds., 2012). *See generally* Rachel Murray, *The Role of National Human Rights Institutions*, in *INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND* 305 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010) (examining the “place . . . occupied by NHRIs in the international human rights arena”); Thomas Pegram, *Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions*, 32 HUM. RTS. Q. 729 (2010) (exploring the interactions of NHRIs with other institutional forms).